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No. 00-310

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

ABDUL RAOUF HASAN KHALIL,
Petitioner,

v.

BCCI HOLDINGS (LUXEMBOURG) S.A.,
BANK OF CREDIT AND COMMERCE INTERNATIONAL S.A.,
BANK OF CREDIT AND COMMERCE INTERNATIONAL
(OVERSEAS) LIMITED, INTERNATIONAL CREDIT AND
INVESTMENT COMPANY (OVERSEAS) LIMITED,
ICIC HOLDINGS LIMITED, AND
CREDIT AND FINANCE COMPANY LIMITED,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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CORPORATE DISCLOSURE STATEMENT PURSUANT TO SUP. CT. R. 29.6

Pursuant to Sup. Ct. R. 29.6, the following is a list of parent corporations of the Respondents. No publicly held company owns ten percent or more of any of the Respondents' stock.

BCCI Holdings (Luxembourg) S.A.

Parent Corporation: None

Bank of Credit and Commerce International S.A.

Parent Corporation: BCCI Holdings (Luxembourg) S.A.

Bank of Credit and Commerce International (Overseas) Limited

Parent Corporation: BCCI Holdings (Luxembourg) S.A.

International Credit and Investment Company (Overseas) Limited

Parent Corporation: ICIC Holdings Limited

ICIC Holdings Limited

Parent Corporation: ICIC Apex Limited

Credit and Finance Company

Parent Corporation: BCCI Holdings (Luxembourg) S.A.

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BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Respondents BCCI Holdings (Luxembourg) S.A. ("BCCI Holdings"), Bank of Credit and Commerce International S.A. ("BCCI SA"), Bank of Credit and Commerce International (Overseas) Limited ("BCCI Overseas"), International Credit and Investment Company (Overseas) Limited ("ICIC Overseas"), ICIC Holdings Limited ("ICIC Holdings"), and Credit and Finance Company Limited ("CFC"), through their Court Appointed Liquidators,[1] oppose the petition for writ of certiorari. Petitioner asserts two bases for certiorari: 1) to review the decision of the court of appeals which, Petitioner asserts, misapplies this Court's decision in *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258 (1992); and 2) to resolve a purported conflict among the circuits concerning the application of the proximate causation standard to actions under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961, *et seq.*

Petitioner presents no valid grounds for the issuance of a writ of certiorari in this case. In *Holmes*, this Court held that common law proximate causation principles applied to RICO, and the Court anticipated "the infinite variety of claims that may arise [that] make it virtually impossible to announce a black letter rule." 503 U.S. at 272 n.20 (*quoting Associated*

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[1] The Court Appointed Liquidators are as follows:

a. BCCI Holdings appears through Liquidators appointed by the District Court in Luxembourg: Jacques Delvaux, Marc Kleyr and Michael Larter.

b. BCCI SA appears through Liquidators appointed by the District Court in Luxembourg: Georges Baden, Julien Roden and George Cihra.

c. BCCI Overseas, ICIC Overseas, ICIC Holdings and CFC each appear through Official Liquidators appointed by the Grand Court of the Cayman Islands: Ian A.N. Wight, Michael W. Mackey, and Michael W. Pilling.

Gen. Contractors v. California State Council of Carpenters, 459 U.S. 519, 536 (1983)). The court below properly applied *Holmes* to find that Khalil's racketeering activity directly injured Respondents. Petitioner points not to a true conflict among the circuits, but rather to an entirely expected result of common law judging: that the application of principles of common law proximate causation will generate varying outcomes based upon the markedly different factual contexts presented in individual cases. Moreover, even if the cases cited by Petitioner rose to the level of a conflict in the circuits, certiorari should not be granted in the instant case because, under any of the approaches taken by the courts of appeals, proximate causation was properly established in this action and the result below would remain the same. Accordingly, review by this Court would be unnecessary and therefore improvident.

STATEMENT OF FACTS

Because Petitioner's asserted bases for certiorari rest upon material mischaracterizations of the district court's factual findings and its grounds for awarding damages, it is necessary for Respondents, pursuant to Sup. Ct. R. 15.2, to present the following Statement of Facts.

This action arises from the collapse of the Bank of Credit and Commerce International ("BCCI") in 1991. BCCI was the largest bank failure in history, leaving a deficit in excess of $10 billion. *See United States v. BCCI Holdings (Luxembourg) S.A.*, 69 F. Supp. 2d 36, 37, 40 (D.D.C. 1999). This lawsuit was brought by the Court Appointed Liquidators, who are appointed by courts in Luxembourg and the Cayman Islands to liquidate the principal BCCI[2] companies and recover assets for the benefit of depositors and

[2] BCCI is used to refer collectively to Respondents.

other innocent creditors. *See United States v. BCCI Holdings (Luxembourg) S.A.*, 48 F.3d 551, 554 (D.C. Cir. 1995).

BCCI's collapse was the result of fraud committed on a massive scale by corrupt managers acting in concert with third-party wrongdoers, including the instant Petitioner Abdul Raouf Hasan Khalil ("Khalil"). *See* Pet'r App. at 17a-21a. The schemes that are the subject of this action were at the heart of this massive fraud. The complaint alleged civil RICO, RICO conspiracy, common law fraud, unjust enrichment, and conversion against Petitioner and three co-conspirators, Syed Ziauddin Ali Akbar ("Akbar"), Capcom Financial Services Limited ("Capcom UK"), and Capcom Futures Inc. ("Capcom US").[3] Respondents pleaded and proved before the district court Khalil's participation in two principal racketeering schemes—the "nominee scheme" and the "Capcom scheme." *Id.* at 40a-42a.

With respect to the nominee scheme, Respondents pleaded and proved that Khalil conspired with corrupt officers of BCCI, agreeing that he would serve as a nominee shareholder in the shares of BCCI Holdings; as a nominee shareholder in the ultimate parent of First American Bank, at one time the largest bank in Washington; and as an all-purpose nominee for BCCI officers, permitting his name and his companies to be used to manipulate BCCI's balance sheet and conceal massive losses that, if exposed, would have caused the closure of the bank. *Id.* at 36a-42a, 96a. With respect to the Capcom scheme, Respondents pleaded and proved that Khalil participated in a separate conspiracy with Akbar, a BCCI officer who managed BCCI's treasury operations, to capitalize and finance Capcom UK, a commodities firm that

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[3] The remaining defendants defaulted and default judgments were duly entered by the district court.

they jointly owned.[4] As part of the Capcom scheme, Khalil and Akbar used Akbar's position as head of treasury to siphon more than one quarter of a billion dollars from BCCI into Capcom for their own use. *Id.* at 56a-57a, 97a-99a. In addition, Khalil and Akbar extorted and diverted tens of millions of dollars more from BCCI. *Id.* at 107a-08a.

Seeking to recast the factual record below, Petitioner asserts an improbable argument never made to the district court—that these schemes were somehow undertaken "for the benefit" of BCCI and therefore BCCI's injuries could not have been proximately caused by the schemes. Wholly apart from the flaw in the legal argument, Khalil's assertion that these schemes were intended to benefit BCCI is flatly contradicted by findings of the district court. The district court concluded based upon the evidence that the schemes undertaken were a fraud *on* the BCCI corporations, designed to induce them to disburse funds for a number of illegal schemes being perpetrated by the co-conspirators. *Id.* at 103a-04a. These racketeering schemes were *not* in BCCI's interest; in fact, they were a direct and complete financial disaster for the bank. *E.g.*, *id.* at 86a-87a, 96a-97a.

With respect to the scheme to acquire First American, the district court found that the acquisition was "economically detrimental" and that the common theme of the racketeering scheme was "to acquire and maintain an interest in and control of the First American enterprise, nominally for Khalil and other nominee shareholders, by using BCCI Group funds to conceal the existence of that control, and to use that control *for the benefit of the co-conspirators*." *Id.* at 85a (emphasis added). Similarly, Khalil's agreement to serve as an all-purpose nominee for BCCI's officers enabled BCCI's officers to hide losses which, if revealed "would have shaken the

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[4] The district court found that Capcom UK "represented the formal incorporation of the Khalil-Akbar partnership." *Id.* at 42a, 97a-98a.

confidence of the bank's real investors and almost certainly would have invited increased regulatory scrutiny that would have led to the bank's closure." *Id.* at 44a. With respect to the separate Capcom conspiracy, Khalil parlayed his position as a nominee into an opportunity to loot enormous sums from the BCCI treasury for his own use. *Id.* at 97a-99a.

In awarding damages, the district court limited its award to those amounts which constituted direct and proximate loss to BCCI. The court awarded as damages amounts diverted from BCCI's treasury for the purpose of making direct payments to Khalil, including payments he extorted from BCCI officers ($27.5 million); payments made on Khalil's behalf for his personal expenses (more than $15 million); payments made to companies owned or controlled by Khalil (more than $47 million); and funds siphoned from BCCI by Khalil and Akbar into Capcom UK (more than $236 million). *Id.* at 107a-09a.

The district court explicitly declined to award damages resulting from the investment of BCCI funds in First American. *Id.* at 86a-87a. Although the court found that the investment of these funds was disastrous for BCCI, it held that "too many intervening factors, such as changing market conditions over a considerable period of time and numerous independent decisions by First American management, led to these losses that the Liquidators seek to attribute to Khalil." *Id.* at 87a. Similarly, the court declined to award as damages virtually all of the losses that BCCI incurred as a result of Khalil's service as a nominee for speculative trading. In the court's words, these damages, "founder on the shoals of the proximate cause requirement." *Id.* at 96a.

One category of damages—losses related to certain metals trading—was found by the district court to be directly related to Khalil's participation in the nominee scheme; the court of appeals reversed with respect to this item of damage, finding that there was insufficient evidence to conclude that the metals trading losses were proximately caused by Khalil's

racketeering. *Id.* at 11a-12a, 96a-97a. Moreover, although the district court recognized that BCCI engaged in speculative trading with Capcom UK and the court relied on evidence of circular transactions between Capcom UK and BCCI to establish the pattern of racketeering and certain predicate acts such as money laundering, *see, e.g., id.* at 90a, 98a-99a, the district court awarded no damages for trading funds sent by BCCI to Capcom UK for that purpose. *Id.* at 100a, 109a. Petitioner's suggestion, Pet. at 5, that these damages were awarded for trading activities carried out by Capcom on behalf of BCCI is a misrepresentation of the record. With respect to Capcom, the district court awarded as damages only those funds "acquired and converted" by the defendants. *Id.* at 100a.

In sum, contrary to Petitioner's characterization, the court carefully limited damages to funds that had been directly diverted from BCCI's treasury by the co-conspirators for their own benefit while the conspiracies were ongoing. None of the damages awarded by the district court reflected consequential loss from the making of illegal nominee investments. None of the damages awarded by the district court was the result of exposure of the scheme, and none of it was attributable to the reaction of any third-party to the exposure of the scheme. The sums extracted by Petitioner from BCCI's treasury were gone long before the collapse of BCCI and the subsequent exposure of the enormous fraud from which Petitioner profited.

The district court's extensive opinion reflects thorough consideration of proximate causation and the policies underlying its application as elaborated by this Court in *Holmes*. The district court found, and the court of appeals substantially affirmed, that each item of damage was directly and proximately caused by Petitioner's admitted acts of racketeering. Contrary to the factual misassumptions upon which Petitioner's first question presented for review is

predicated, the district court did *not* find that BCCI benefited from the racketeering activity engaged in by Petitioner; it found that the activity constituted a fraud on BCCI and that BCCI's treasury was directly and catastrophically pillaged to the extent of hundreds of millions of dollars extorted or stolen by Petitioner and his co-conspirators.

ARGUMENT

I. The Court of Appeals Correctly Applied *Holmes v. Securities Investor Protection Corp.*, Which Is Dispositive of the Instant Case.

In *Holmes*, this Court addressed the issue of causation under the RICO statute, holding that common law principles of proximate cause applied to RICO and that a RICO plaintiff must establish "direct" injury in order to recover. 503 U.S. at 264-70. The opinions below in this case do not conflict with *Holmes;* indeed, they are models of the careful and practical common law process of applying law to fact that *Holmes* envisions. Petitioner's request for certiorari based on a purported misapplication of this Court's guidance in *Holmes* is not only without basis, it seeks to involve this Court in a fact-intensive examination of how the proximate cause standard was applied to a complex factual matrix. This is not an appropriate ground for certiorari. Sup. Ct. R. 10.

In *Holmes*, the Securities Investor Protection Fund ("SIPC"), the insurance fund that reimburses customers of insolvent broker-dealers, sued certain defendants who had engaged in securities fraud that resulted in the insolvency of two broker-dealers. SIPC advanced funds to reimburse customers for claims against the insolvent broker-dealers and became subrogated to the customers' claims. *Id.* at 262-63. Acting solely on behalf of those customers whose accounts had not been manipulated by the defendants, but whose losses flowed from the resulting bankruptcies of the broker-dealers, SIPC asserted RICO claims against the perpetrators of the securities

fraud. SIPC contended that these customers were injured "by reason of" the defendants' manipulation of other customers' securities because the securities frauds caused the broker-dealers to fail. This Court denied the claims as derivative and indirect, holding that "[t]he broker-dealers simply cannot pay their bills, and only that intervening insolvency connects the conspirators' acts to the losses suffered by the non-purchasing customers and general creditors." *Id.* at 271. This Court noted that the liquidating trustees of the insolvent broker-dealers, who were directly injured by the manipulation, were proper RICO plaintiffs who could be counted on to bring suit for the law's vindication. The Court found that the non-manipulated customers were simply general creditors who should seek relief from the liquidating trustees in the insolvency proceedings rather than engage in satellite litigation which would raise complicated issues of apportionment and priorities. *Id.* at 272-74.

Holmes held that common law principles of proximate causation applied to RICO cases. Citing *Prosser and Keeton on the Law of Torts*, this Court stated, "Here we use 'proximate cause' to label generically the judicial tools used to limit a person's responsibility for the consequences of that person's own acts." *Id.* at 268. The Court drew a sharp distinction between direct and derivative injury, but, taking into account "'the infinite variety of claims that may arise,'" *id.* at 272 n.20 (citation omitted), and the "many shapes [the concept of proximate cause] took at common law," *id.* at 268, left the precise parameters of proximate cause to be worked out on a case-by-case basis. Relying on its earlier decision in *Associated General Contractors v. California State Council of Carpenters*, 459 U.S. 519 (1983) ("*AGC*"), the Court recognized that its decision not to apply a bright-line test for proximate cause could result in different emphases or approaches being taken by courts in different factual circumstances. *See Holmes*, 503 U.S. at 272-73 & n.20; *AGC*, 459 U.S. at 535-36 & n.33. But the Court emphasized

the need for flexibility to consider the "infinite variety" of factual situations and expressly declined to adopt specific "black letter" tests for direct injury that had been employed by certain lower courts. *Holmes*, 503 U.S. at 272 n.20.[5]

The courts below in this action properly applied *Holmes* in finding that Respondents were directly injured by the Petitioner and his co-conspirators. The district court stated, "The parties agree that a defendant's acts proximately cause plaintiffs injuries when such acts are a substantial factor in the sequence of responsible causation, and where the plaintiff's injury was reasonably foreseeable or anticipated as a natural consequence of those acts." Pet'r App. at 86a. This formulation, which was never challenged by Petitioner and was left undisturbed on appeal, is consistent with District of Columbia common law, which requires the finder of fact to determine that: i) the defendant's "act or failure to act played a substantial part in bringing about the injury or damage;" and ii) "the injury or damage was either a direct result or a reasonably probable consequence of the act or failure to act." *Standardized Civil Jury Instructions for the District of Columbia*, Instruction No. 5-12 (Richard W. Stevens ed. 1998); *Tarpeh-Doe v. United States*, 28 F.3d 120, 124 (D.C. Cir. 1994).

Under this test, there is no question that BCCI was directly injured by the conspirators' misconduct. *See Hamid v. Price Waterhouse*, 51 F.3d 1411, 1419-20 (9th Cir. 1995) (RICO claims belong to the BCCI corporations not to the depositors who were only derivatively injured). BCCI does not stand behind the injured parties—one step removed—as did SIPC

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[5] Among the formulations the Court expressly declined to adopt as a "black letter" rule was the one applied by the Eleventh Circuit in *Pelletier v. Zweifel*, 921 F.2d 1465 (11th Cir. 1991). *Holmes*, 503 U.S. at 272 n.20. In *Pelletier*, the court considered whether the plaintiff was the intended target of the racketeering activity, which is strikingly similar to the "black letter" rule urged by Petitioner.

in *Holmes*. BCCI, an insolvent banking group suing through its Court Appointed Liquidators, is in the same position as the insolvent broker-dealers in *Holmes*, which this Court delineated as the proper, directly injured plaintiffs in that case. 503 U.S. at 273-74.

Contrary to Petitioner's argument that the court of appeals failed to undertake an analysis of the policy considerations underlying *Holmes*, Pet. at 8, both the district court and the D.C. Circuit applied proximate cause to reflect "'ideas of what justice demands, or of what is administratively possible and convenient.'" Pet'r App. at 11a (*quoting Holmes*, 503 U.S. at 268). The court of appeals discussed each of the policy considerations discussed in *Holmes*: it noted the importance of applying rules of proximate cause to prevent the courts from becoming "ensnared in administratively complex questions over factual causation and apportionment of damages," *id.*, and stated that proximate cause should be applied to preclude suit by indirectly injured plaintiffs because "directly injured victims can generally be counted on to vindicate the law as private attorneys general." *Id.*

Relying on these policy considerations, the court of appeals substantially affirmed the awards of damages of the district court. Petitioner's argument to this Court that two of the factors were improperly applied by the court of appeals does not withstand analysis. Petitioner suggests that BCCI's injury was derivative of injury to First American or to certain undefined U.S. regulators. But there was no question of apportionment of damage or the existence of more directly injured victims in this case: all of the damage awarded reflected funds paid away from the treasury of BCCI into the pockets of Khalil and his co-conspirators. These were losses to BCCI and to BCCI alone. Nor can it be argued that the court of appeals failed to consider the "difficult and complex cost/benefit analysis" related to Khalil's nominee investment in First American. Pet. at 13. No evidence was ever presented, and Petitioner cites none, that BCCI experienced any

economic benefit from the use of its funds to purchase First American.

Accordingly, Petitioner's first argument for certiorari—that the court of appeals misapplied *Holmes*—is without support in fact or law. The court of appeals affirmed an award of damage based upon direct loss to BCCI. As a result of the racketeering conspiracy, funds were siphoned away from BCCI into the hands of the wrongdoers and never recovered. In finding that this harm was proximately caused by Petitioner's racketeering, the court of appeals was faithfully applying "ideas of what justice demands." *Holmes*, 503 U.S. at 268. Petitioner's suggestion that he should not be held to account for the hundreds of millions of dollars of extortion and payoffs he received because, contrary to the finding of the courts below, one of the co-conspirators might have subjectively contemplated some benefit in the scheme is belied by the facts of this case and by the law of proximate causation. *See In re EDC, Inc.*, 930 F.2d 1275, 1279-80 (7th Cir. 1991). Petitioner's argument would turn logic and justice, and *Holmes*, on their heads.

II. There Is No Conflict Among the Circuits on Any Issue of Principle.

Petitioner's other ground for review is a purported conflict between the law applied by the Second and Seventh Circuits and that applied by the District of Columbia Circuit in the instant case. Specifically, Petitioner argues that the Second and Seventh Circuits have adopted a bright-line rule in RICO actions that a corporate plaintiff seeking damages for a racketeering act involving its own officers and directors must establish that the corporation was the target of the racketeering conduct and that harm to the plaintiff was a preconceived purpose of the racketeering scheme. The cases invoked by Petitioner, however, do not represent a fundamental conflict in circuit law. Each of the referenced circuits

applies the same general principles of common law proximate causation articulated in *Holmes*. As this Court anticipated, application of these principles to varying sets of facts will result in varying resolutions. That is an expected outcome of common law analysis, not a conflict in the circuits.

Each of the referenced circuits has adopted the general rule that to be actionable, a RICO injury must be direct. This restates the rule of *Holmes* that RICO injury must have been proximately caused by the racketeering activity. *See* Pet'r App. at 10a-11a; *Israel Travel Advisory Serv., Inc. v. Israel Identity Tours, Inc.*, 61 F.3d 1250, 1257 (7th Cir. 1995); *Raybestos Prods. Co. v. Younger*, 54 F.3d 1234, 1243 (7th Cir. 1995); *Laborers Local 17 Health & Benefit Fund v. Philip Morris, Inc.*, 191 F.3d 229, 234-39 (2d Cir. 1999); *First Nationwide Bank v. Gelt Funding Corp.*, 27 F.3d 763, 769 (2d Cir. 1994). Following the direction of this Court, the Second and Seventh Circuits have expressly *refused* to adopt a bright-line rule for the application of proximate cause, *see Laborers Local*, 191 F.3d at 238-39 & n.4; *Raybestos*, 54 F.3d at 1243, but have acknowledged the need for flexibility to address the specific facts of each case. Indeed, in *Raybestos*, the Seventh Circuit cites *Mendelovitz v. Vosicky*, 40 F.3d 182 (7th Cir. 1994), which is the case relied on by the Petitioner for the proposition that the Seventh Circuit has adopted a strict uniform rule concerning application of proximate cause. But the Seventh Circuit concludes in the same paragraph of the discussion, "How 'direct' [the injury must be], of course, cannot be reduced to a single uniformly applicable equation. Instead notions of justice and policy often dictate the boundaries of 'proximate causation.'" *Raybestos*, 54 F.3d at 1243. Thus, although the specific cases relied upon by Khalil may present particular applications of proximate causation to specific sets of facts, those courts of appeals have made clear, contrary to Petitioner's argument, that they are *not* articulating a single standard with respect to the application of proximate cause.

As anticipated in *Holmes*, the cases cited by Petitioner reflect each court's common-sense application of the varied factors of proximate cause to the particular case before it in determining whether the asserted injury was sufficiently direct to assign liability to the defendant. The principal case relied on by Petitioner, *In re American Express Co. Shareholder Litigation*, 39 F.3d 395 (2d Cir. 1994) ("*American Express*"), was a derivative suit filed by shareholders on behalf of the American Express Company against its directors and officers. The complaint asserted that American Express had been damaged through a defamation scheme instituted by its officers against a potential competitor. When the scheme was exposed, the competitor threatened to sue and a settlement was agreed. The complaint sought to recover the funds paid in settlement, as well as additional damage to American Express' good will and business. The Second Circuit determined that damage to American Express was not proximately caused by the RICO violation because any harm to American Express was caused by the failure of the scheme, its exposure and the competitor's reaction to it, rather than by the scheme itself. *American Express*, 39 F.3d at 400. These intervening causes were found to have broken the chain of direct causation; accordingly, the harm to the corporation from the scheme was found to be insufficiently direct for recovery.

Similarly, *Mendelovitz* was a shareholders' derivative suit alleging that Comdisco's officers had engaged in a scheme to create a "computer chop-shop" in violation of Comdisco's lease agreements with IBM. When IBM discovered the scheme, it sued Comdisco. Mendelovitz's suit on behalf of Comdisco asserted that the corporation was injured in the amount it had spent on legal fees, and in a loss of good will associated with the exposure of the violations. Based on *Holmes*, the Seventh Circuit affirmed the district court's determination that Comdisco's injury was not proximately caused by the racketeering scheme, because any damage to

Comdisco was caused by exposure of the violation, and by the intervening cause of IBM's decision to sue for damages. *Mendelovitz*, 40 F.3d at 187.

Thus, in both *American Express* and *Mendelovitz*, the corporations were not directly injured by the actions of their officers. Rather, any injury to the corporation occurred when i) the actions were exposed, *and* ii) a third party, whose injuries were direct, took action against the corporations, requiring the corporations to expend legal fees and pay damages. Whatever the merits of the approaches announced by the Second and Seventh Circuits regarding these "boomerang" injury actions, these cases do not announce any bright-line standards that would have application to the very different case currently before this Court. In asserting the existence of a conflict based on these fact-intensive determinations, Petitioner seeks to immerse the Supreme Court in a comparative common law inquiry that *Holmes* clearly entrusted to the district courts and courts of appeals.

Petitioner tries to draw false parallels to *American Express* and *Mendelovitz* by identifying two third parties who, he asserts, were the targets of the racketeering scheme—First American Bank and various American bank regulators. Pet. at 12-13. But unlike *American Express* and *Mendelovitz*, the damages awarded by the court in this case were in no way dependent on any injury to these third parties. BCCI—no one else—suffered these losses when its funds were taken, long before any exposure of the BCCI scandal. First American did not sue BCCI causing its losses. In the single area where the injuries may conceivably have overlapped—damages incurred because of First American's decline in value—the district court expressly refused to award damages. Pet'r App. at 86a-87a. There was no direct economic injury to U.S. regulators of which BCCI's losses were derivative. Thus, Petitioner's analogy to *American Express* and *Mendelovitz* fails. *See Israel Travel*, 61 F.3d at 1257; *Mid Atlantic*

Telecom, Inc. v. Long Distance Servs., Inc., 18 F.3d 260, 264 (4th Cir. 1994).

To the extent that *American Express* and *Mendelovitz* consider whether the plaintiff corporation was the "target" of the racketeering activity, they do so as an individual factor relevant to proximate causation in the particular cases before them.[6] Petitioner attempts to ratchet one of "the many shapes [the concept of proximate cause] took at common law," *Holmes*, 503 U.S. at 268, into an issue of legal principle in which the circuits are in conflict. Yet it is Petitioner's position, and not the decisions of the Second, Seventh and D.C. Circuits, that is at odds with the case-by-case consideration that *Holmes* requires.

As this Court has observed, "Legal theory is too rich in content not to afford alternative ways, and frequently several of them, for stating an acceptable judgment." *AGC*, 459 U.S. at 537 n.32 (*quoting* Leon Green, Comment, *Mahoney v. Beatman: A Study in Proximate Cause*, 39 Yale L.J. 532, 533 (1930)). To the extent that the language utilized in *American Express* and *Mendelovitz*, focusing on the target or the purpose of the scheme, constitutes an alternative focus in arriving at a correct decision with respect to the directness of

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[6] Respondents do not read either the Second or Seventh Circuits as requiring post-*Holmes* that every corporate RICO plaintiff must prove he was the "target" of the racketeering scheme or that harm to him was the preconceived purpose of the scheme. Were the Second and Seventh Circuits actually announcing a black letter rule to this effect, such a rule would be in conflict both with *Holmes* and the D.C. Circuit's opinion in this case which follows *Holmes*. But the extensive precedent in these circuits is highly suggestive that the Second and Seventh Circuits have not adopted such a uniform rule, although these factors may be among those considered by the courts in determining whether a particular harm was proximately caused by particular conduct in a particular case.

harm in those cases, they are not in conflict with either the D.C. Circuit's decision in this case or with *Holmes*.[7]

III. Certiorari Would in Any Event Be Imprudent Because Resolving the Purported Conflict in the Circuits Would Not Change the Result Below.

Even if this Court were to determine that there was a conflict in circuit law, a writ of certiorari should not issue because resolution of the proximate cause question by the Court would not affect the outcome of this case. As the decisions in the courts below make clear, under *any* test, the harm to BCCI for which damages were awarded was direct and proximately caused by the racketeering scheme.

Khalil argues that BCCI could not have been a target of the scheme because these disastrous schemes were intended to "benefit" the corporations by permitting BCCI to continue as a business despite its catastrophic losses and resulting insolvency. Pet. at 13. Khalil's argument is not only unsupported by the factual record, it is legally flawed. The continuation of a corporation's existence based on the concealment of losses and illegalities is a harm, *not* a benefit to the corporation. *See In re Sunrise Sec. Litig.*, 916 F.2d 874, 883 (3d Cir. 1990); *Hamid*, 51 F.3d at 1419; *Schacht v. Brown*, 711 F.2d 1343, 1359 (7th Cir. 1983); *In re Investors Funding Corp. of N.Y. Sec. Litig.*, 523 F. Supp. 533, 541 (S.D.N.Y. 1980). But, in any event, BCCI was not awarded damages for the deepening of its insolvency.

BCCI did suffer massive losses on account of the criminal forfeiture of its illegal investment in First American, and the understatement of BCCI's capital that was disguised by the

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[7] Petitioner relies extensively on a district court decision, *BCCI Holdings (Luxembourg) S.A. v. Pharaon*, 43 F. Supp. 2d 359 (S.D.N.Y. 1999). That decision, which Respondents submit is a misapplication of proximate cause standards announced in *Holmes*, is currently on appeal in the Second Circuit.

stock nominee scheme permitted the conspirators to continue squandering BCCI's dwindling assets. But the district court did not award these losses as damages. Instead, the court carefully limited its award to damages as to which there could be no question under any formulation of proximate cause.

The court did not award damages that even arguably arose out of an intent to benefit BCCI. The court awarded as damages those funds that Petitioner extorted from BCCI, Pet'r App. at 62a-63a, and those funds expended to pay his personal expenses in connection with his nominee role. *Id.* at 42a-43a, 107a-08a. Not only were these BCCI losses a direct and reasonably foreseeable consequence of Khalil's racketeering conduct, but at least as to these elements of damage, BCCI was his sole, direct and intended target. With respect to the Capcom conspiracy, under which the vast majority of damages were awarded, it is inarguable that BCCI was the sole target of this conspiracy whose purpose was to loot BCCI funds for the Petitioner's own benefit. It is difficult to conceive how Khalil intended to benefit BCCI by looting more than $236 million from the BCCI treasury, obtaining more than $27 million in direct payments (including payments extorted from BCCI officers), and arranging for an additional $15 million in payment of his expenses and for transfer of more than $47 million to companies owned by him and his co-conspirator Akbar. *See id.* at 107a-09a. Even under the more stringent standards which Petitioner suggests are imposed in the Second and Seventh Circuits, the looting of a corporation constitutes direct harm for which RICO damages may be awarded, and the award in this case would not be affected. *See In re Teledyne Defense Contracting Derivative Litig.*, 849 F. Supp. 1369, 1375 n.2 (C.D. Cal. 1993). Because the Court's resolution of the question presented by Petitioner would not affect the determination in this case, it would be improvident for this Court to review the question. *See Kleyr v. A.O. Smith*

Corp., 521 U.S. 179, 191-92 (1997) (declining as a matter of prudence to address statute of limitations accrual tests that would not affect outcome of case before Court).

CONCLUSION

Wherefore, for the reasons stated herein, Respondents respectfully request that the petition for a writ of certiorari be denied.

Respectfully submitted,

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